

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHRISTOPHER KING,

Defendant-Appellee.

UNPUBLISHED

May 9, 2006

No. 261085

Wayne Circuit Court

LC No. 04-011930-01

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order dismissing charges of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The court dismissed the charges after suppressing evidence of a gun discovered by the police during a warrantless search. We reverse.

At an evidentiary hearing on defendant's motion to suppress, Detroit Police Officer Brian Vieau testified that he and his partner were on routine patrol when they observed a parked car with two people sitting inside in an alley behind a garage at approximately 2:30 a.m. The car was running, the windows were closed, and the headlights and taillights were on. Officer Vieau observed the driver look over his left shoulder in their direction, open his door, and pour out the contents of a plastic cup. In Vieau's experience, the driver's behavior was indicative of consuming alcoholic beverages, so Vieau and his partner decided to make a traffic stop.

Vieau approached the passenger side of the vehicle and his partner approached the driver's side. Defendant was in the front passenger seat. Vieau observed a 40-ounce beer bottle in defendant's lap. Vieau ordered defendant out of the vehicle, and his partner ordered the driver out. Vieau's purpose of ordering defendant out of the car was to pat him down for safety. He intended to issue a ticket for possession of open intoxicants in a motor vehicle. When defendant got out of the vehicle, Vieau noticed that defendant's jacket was sagging heavily to the left, and he was extremely intoxicated. Defendant put his hands on top of the car, and upon Vieau patting him down, Vieau felt a gun in defendant's pocket.

Defendant and the driver of the vehicle testified that the police approached them as they were sitting in a parked car, which was not running, ordered them out, and proceeded to search

the car. Defendant denied having beer in the car, admitted that the driver was drinking an alcoholic beverage, but maintained that he did not pour it out.

Accepting the officer's version of events, the trial court concluded that when the officer ordered defendant out of the car, he was "concerned about his safety for no articulable reason, only because it was at night and he couldn't see in the car." The court concluded that there was no articulable reason to pat defendant down and, therefore, the search and seizure of the gun were illegal.

This Court reviews a trial court's factual findings in a suppression hearing for clear error. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005) (citations omitted). Because the application of constitutional standards by the trial court is not entitled to the same deference as factual findings, this Court reviews de novo the trial court's ultimate ruling on a motion to suppress. *Id.*; *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

The trial court erred in its application of constitutional standards to the facts. In *Pennsylvania v Mimms*, 434 US 106; 98 S Ct 330; 54 L Ed 2d 331 (1977), the police stopped a vehicle with an expired license plate for the purpose of issuing a traffic summons. *Id.*, p 107. Although the officer had no reason to suspect the driver of "foul play" and there was nothing unusual or suspicious about his behavior, *id.*, p 109, the officer ordered him to exit the vehicle and produce his owner's card and operator's license. *Id.*, p 107. The driver alighted and the officer noticed "a large bulge" under the driver's sports jacket. *Id.* The officer frisked him and discovered a loaded revolver in his waistband. In addressing the question whether the gun should have been suppressed, the Court first focused on whether it was constitutionally permissible for a police officer, following a lawful stop, to order a driver out of a vehicle where the officer has no reason to suspect the driver. The Court noted the safety concerns that are inherent in officers approaching individuals seated in automobiles and concluded that these concerns outweigh the de minimis intrusion into the driver's personal liberty caused by asking him to exit the vehicle. *Id.*, p 111. The Court then turned to whether the bulge in the suspect's jacket justified the pat down search. Relying on *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the Court concluded that it did:

Under the standard enunciated in that case—whether the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate—there is little question that the officer was justified. The bulge in the jacket permitted the officer to conclude that Mimms was armed and this posed a serious and present danger to the safety of the officer. In these circumstances, any man of reasonable caution would likely have conducted the pat down. [*Mimms, supra*, p 112 (citation and internal quotation marks omitted).]

In *Maryland v Wilson*, 519 US 408, 415; 117 S Ct 882; 137 L Ed 2d 41 (1997), the Court extended the "rule of *Mimms*" to passengers as well as drivers, and thus "an officer making a traffic stop may order passengers to get out of the car pending completion of the stop."

This case is comparable to *Mimms*, as extended by *Wilson*. Here, the police did not stop the car; it was stationary when the police approached. But when the officer observed the open bottle containing beer inside the vehicle, the officer had grounds to issue a citation for open

intoxicants. The brief detention involved for writing the citation is akin to the traffic stop to write a summons for expired tags in *Mimms*. Additionally, *Mimms* and *Wilson* establish that the officer acted lawfully when ordering defendant to exit the vehicle. The officer's observation of a bulge under the driver's sports jacket in *Mimms* is comparable to the officer's observation in this case that defendant's jacket was "sagging heavily to the left." Just as the *Mimms* Court concluded that the bulge permitted the officer to pat the suspect down for weapons, we conclude that defendant's heavily sagging jacket justified the officer's action here. See also *People v Taylor*, 214 Mich App 167; 542 NW2d 322 (1995) (officer's observation of a bulge in the front of the defendant's jacket in waist area provided particularized suspicion to stop and frisk).

For these reasons, we reverse the trial court's orders granting defendant's motion to suppress the gun and dismiss the charges.

Reversed and remanded. We do not retain jurisdiction.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot